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August 13, 2007

Honorable Ronald M. George, Chief Justice
and the Honorable Associate Justices
California Supreme Court
c/o Court of Appeal
Fourth District, Division One
Symphony Towers
750 B Street, Suite 300
San Diego, California 92101

Re: Request for Review or Depublication, *Brandenburg v. Eureka Development Agency*, Cal. S. Ct. No. S155212 (Court of Appeal Case No. H026867)

Dear Chief Justice George and Associate Justices:

Pursuant to Rules 8.500 (g) and 8.1125 of the California Rules of Court, the City of San Diego respectfully requests that this Court grant the Petition for Review filed in *Brandenburg v. Eureka Development Agency*, 152 Cal. App. 4th 1350 (July 2, 2007) ("*Brandenburg*"). In the alternative, this Court should order depublication of the Court of Appeal's decision, which contravenes both the existing case law and the recently-expressed legislative intent.

THE NATURE OF THE CITY'S INTEREST

The City of San Diego ("City"), the State's second largest city, currently is engaged in one of the most significant civil cases in its history, involving hundreds of millions of dollars of illegal public employee pension benefits. These benefits were granted in violation of Government Code § 1090, and thus are void under Government Code § 1092, because the contracts were negotiated and approved by government officials who had personal financial interests in the contracts and who acted against their fiduciary duty in approving them.

The City began trial of its case—which the court previously refused to find time-barred—in October 2006. Following six weeks of Phase I trial proceedings, the Superior Court determined in December 2006 that certain parties needed to be added to the

litigation. The City added these parties in an amended pleading, which was to be the subject of Phases II and III of the trial. However, prior to the continuation of the trial, the Court of Appeal, First Appellate District, Division One, published its *Brandenburg* opinion, in which that court held that the applicable statute of limitations for a Government Code § 1090 action is one year from the date of the contract.

Opining that he was now bound by *Brandenburg*, on August 3, 2007, San Diego Superior Court Judge Jeffrey B. Barton granted a demurrer without leave to amend, dismissing the City's pleading and ruling that "[t]he court must apply the currently applicable law to the pending case which is one year statute of limitations as described in *Brandenburg*." (Order After Hearing on Intervenors' Joint and Several Demurrer to the City of San Diego's Sixth Amended Cross-Complaint, dated August 3, 2007, 11:8-9).

THE COURT OF APPEAL'S BRANDENBURG OPINION IS CONTRARY TO LAW AND PUBLIC POLICY AS RECENTLY ANNOUNCED BY THE LEGISLATURE

In *Brandenburg*, rejecting prior law that had contemplated a statute of limitations for Government Code §§ 1090 and 1092 actions of three or four years, *see Marin Healthcare District v. Sutter Health* (2002) 103 Cal.App.4th 861, 877-78, the Court of Appeal opted for an extremely brief *one-year* limitations period, and held that an action to set aside an illegal government contract under Government Code § 1092 is barred by Code of Civil Procedure § 340(a) as an "action upon a statute for a penalty or forfeiture." Ironically, this ruling comes in the face of legislation just signed into law, which expands the limitations period under Government Code § 1092 to *four years* from the date of discovery. *See generally Norgart v. Upjohn Co.* (199) 21 Cal.4th 383, 396 (to decide any particular limitations period "belongs to the Legislature alone" and discussing policy that cases should be decided on their merits).

Specifically, on July 12, 2007, Governor Schwarzenegger signed into law Assembly Bill 1678. (A copy of the newly amended Government Code § 1092 is attached as Exhibit A.) Assembly Bill 1678 amends Government Code § 1092 to provide that the statute of limitations for suits to void a contract made in violation of Government Code § 1090 is now "four years after the plaintiff has discovered or in the exercise of reasonable care should have discovered the violation." In adopting that extended statute, the legislature made clear its intent that the statute apply to existing cases, by its extended discussion of the Southgate situation, in which contracts had been shielded from scrutiny due to the combined effect of an uncertain statute of limitations and complex schemes by government officials that kept their misdeeds under wraps for an extended period. *See* Senate Judiciary Committee history, attached hereto as Exhibit B. The Legislature also noted that existing law was unclear, with courts applying varying limitations periods, including a three-year limitations period or a four-year limitations period. The

Legislature also recognized the importance of these statutes, as previously discussed in this Court's opinion in *Thomson v. Call* (1985) 38 Cal.3d 633. Regardless of any provision on retroactivity, this law plainly should apply to pending cases not already barred unless the statute expressly provides to the contrary, which Assembly Bill 1678 assuredly does not. See *Douglas Aircraft Co., Inc. v. Cranston* (1962) 58 Cal.2d 462, 465; *Mojica v. 4311 Wilshire LLC* (2005) 131 Cal.App.4th 1069, 1073-74.

The Court of Appeal's opinion in *Brandenburg* contravenes not only this recently announced, clearly stated legislative intent, but also the public policy underlying Government Code §§ 1090 and 1092. As another Court of Appeal recently noted:

To construe the statute narrowly would permit certain categories of schemes and improprieties to go unchecked, a result which would undermine the public's confidence not only in the government, but in the court system ruling on such cases. An important, prophylactic statute such as section 1090 should be construed broadly to close loopholes; it should not be constricted and enfeebled.

Carson Redevelopment Agency v. Padilla (2006) 140 Cal.App.4th 1323, 1335.

In reaching its conclusion that an action based on Government Code §§ 1090 and 1092 is "an action on a statute for a penalty or forfeiture" within the terminology of Code of Civil Procedure § 340(a), the *Brandenburg* Court of Appeal disregarded not only the public policy supporting a broad reach of these important statutes, and the new legislation and long-standing case law supporting a longer limitations period, but also the actual words of the relevant statutes: Neither Government Code § 1090 nor Government Code § 1092 provides for a "forfeiture" within the meaning of Code of Civil Procedure § 340(a). Rather, they simply prohibit public officials from having a financial interest in contracts made by the bodies they serve and provide that such contracts are void. Government Code § 1090 seeks to remedy the evil of having public officials torn between self interest and the public's interest by creating a rule of law that requires conflicted public officials to abstain from taking action on contracts in which they have a personal financial interest. Tellingly, criminal charges under Government Code § 1097 must be brought within three years from discovery (see *People v. Honig* (1996) 48 Cal.App.4th 289, 304), a rule impossible to reconcile with a narrow window for pursuing civil cases that *Brandenburg* adopts for the same or similar conduct. As recognized in *Marin Healthcare*, 103 Cal.App.4th at 875, it is the nature of the right sued upon—not the remedy nor the relief—that determines the statute of limitations. Accordingly, a remedy of forfeiture is irrelevant, and applying the four-year limitation period of Code of Civil Procedure § 343 "would certainly be consistent with existing case authority." *Id.* at 878.

**REVIEW SHOULD BE GRANTED, OR AT A MINIMUM, BRANDENBURG
SHOULD BE DEPUBLISHED**

If left undisturbed, *Brandenburg* threatens to undo the recent legislative handiwork and to deprive San Diego taxpayers of their day in court to contest the creation of hundreds of millions of dollars in illegal pension benefits, an illegal debt that will have to be repaid by the taxpayers over the next twenty years. The *Brandenburg* decision allows the legality of the contracts loaded on the backs of City taxpayers by self-interested public officials to remain unexamined. The *Brandenburg* decision erroneously creates this outcome for the City taxpayers because it now sets out a rule of law that actions for violation of Government Code § 1090 must be brought within one year of the date of the creation of the contract in question.

Government Code § 1090 and § 1092 are statutes essential for the promotion of good governance. Government Code § 1090 and § 1092 allow the public relief from contracts entered into by persons who had a personal financial interest in the contract when the contract was entered into. The *Brandenburg* decision undermines prohibitory and penalizing effect of Government Code §§ 1090 and 1092 if the public has no recourse to void a potentially voidable contract one day and one year after the contract was entered into.

Therefore, the City urges the Court to grant the Petition for Review filed by Petitioner Sue C. Brandenburg as the question of law involved is one of major importance to San Diego, as well as to all governmental entities throughout the State, which depend upon broad application of the important conflict of interest laws embodied in §§ 1090 and 1092 to protect their ability to rectify improper actions by individual government officials. Alternatively, if this Court concludes not to grant review on the merits, the City requests that this Court order depublication of *Brandenburg*.

Respectfully submitted,



Michael J. Aguirre
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cc: All Parties
Clerk of the Court of Appeal

EXHIBIT "A"

Assembly Bill No. 1678

CHAPTER 68

An act to amend Section 1092 of the Government Code, relating to conflicts of interest.

[Approved by Governor July 12, 2007. Filed with
Secretary of State July 12, 2007.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1678, De La Torre. Public officials: conflicts of interest.

Existing law provides that Members of the Legislature, and state, county, district, judicial district, and county officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. A contract made in violation of any of these provisions may be avoided at the instance of any party except the officer interested in the contract, and may not be avoided because of the interest of an officer therein unless the contract is made in the official capacity of the officer, or by a board or body of which the officer is a member.

This bill would provide that the applicable statute of limitations for commencing an action under the provisions governing the avoidance of contracts in violation of existing law is 4 years after the plaintiff has discovered, or in the exercise of reasonable care should have discovered, the violation.

The people of the State of California do enact as follows:

SECTION 1. Section 1092 of the Government Code is amended to read:

1092. (a) Every contract made in violation of any of the provisions of Section 1090 may be avoided at the instance of any party except the officer interested therein. No such contract may be avoided because of the interest of an officer therein unless the contract is made in the official capacity of the officer, or by a board or body of which he or she is a member.

(b) An action under this section shall be commenced within four years after the plaintiff has discovered, or in the exercise of reasonable care should have discovered, a violation described in subdivision (a).

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EXHIBIT "B"

SENATE JUDICIARY COMMITTEE
Senator Ellen M. Corbett, Chair
2007-2008 Regular Session

AB 1678	A
Assemblymember De La Torre	B
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Hearing Date: June 19, 2007	1
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SUBJECT

Public Officials: Conflicts of Interest
Action to Void Public Contract: Statute of Limitations

DESCRIPTION

This bill would enact a four-year statute of limitations to commence an action to avoid a contract in violation of existing law that prohibits specified public officials from having a financial interest in a contract entered into by the public official in his or her official capacity or by any board or body of which he or she is a member. The four years would run from the time the plaintiff discovered, or in the exercise of reasonable care should have discovered, the violation.

BACKGROUND

Government Code 1090 prohibits Members of the Legislature, and state, county, district, judicial district, and city officers or employees from having any financial interest in any contract made by them in their official capacity, or by any board or body of which they are members. They are also prohibited from being purchasers at any sale or vendors at any purchase made by them in their official capacity. Government Code 1092 provides that a contract made in violation of 1090 may be avoided at the instance of any party other than the officer with interest in the contract, and requires that the contract must have been made in the official capacity of

(more)

the officer or by a board or body of which the official was a member. Both 1090 and 1092 have spawned hundreds of cases, each court affirming the principle that government officials owe paramount loyalty to the public and that private or personal financial considerations of a public official should not be allowed to enter the decision making-process.

Two years ago, Albert Robles, former Treasurer of the City of Southgate in the author's district, was convicted of fraud, money laundering, and public corruption in the conduct of the city's business. During his tenure, various contracts were let by the city that resulted in kickbacks of more than \$1.2 million to Robles and his associates; law firms friendly to Robles ran up huge legal fees, charging hourly rates far above what other municipalities allow; some city employees received huge raises and extravagant severance packages; yet some employees, such as two police captains, a lieutenant and the chief of police, were so mistreated they sued the city and the city has had to spend large sums to defend itself. There were alleged payoffs in the award of a \$48-million trash-hauling contract, a \$24-million housing project for senior citizens, and a \$4-million contract to oversee sewer improvements. The city's redevelopment agency had entered into \$30 million worth of contracts during Robles' term, but only had \$24 million in available redevelopment funds. A developer, for example, was given \$12 million by the city to create moderate-income housing after selling him a seven-acre parcel for \$1. Robles' actions left the city with even more legal fees from lawsuits stemming from the corrupt practices, and a reserve fund that dwindled from \$8 million to \$3 million in a few years. One law firm has been ordered by the federal court to return over \$500,000 in legal fees charged to the city for representing Robles before grand juries. In short, this small city has had to lay off workers, raise taxes, freeze hiring, and sell off property to meet its obligations.

Additionally, Southgate has attempted to block some of the contracts Robles and his cohorts issued, with limited success. While the city is struggling with its financial condition, it has had to spend several million dollars in legal fees trying to undo bad deals from Robles' term of office. Because of the complexity of the cases, the city

is running into statute of limitations problems in bringing lawsuits to avoid some of these contracts.

Presently the state courts are split as to the statute of limitations applicable to lawsuits brought pursuant to violations of Gov. Code 1090. The leading case of Marin Healthcare Dist. v. Sutter Health 2002) 103 Cal.App.4th 861 found that actions brought under Gov. C. Sec. 1090 are subject to the statutes of limitations in the Code of Civil Procedure for actions other than for recovery of real property (C.C.P. 335 et seq.) and fall in the "catch-all" provision of Code of Civil Procedure Sec. 343: "an action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."

This bill would establish a four-year statute of limitations for commencing actions to avoid contracts where a violation of 1090 has occurred.

CHANGES TO EXISTING LAW

Existing law prohibits Members of the Legislature, and state, county, district, judicial district, and county officers or employees from having any financial interest in any contract made by them in their official capacity, or by any board or body of which they are members. (Government Code 1090. All references are to the Government Code unless otherwise indicated.)

Existing law provides that a contract made in violation of Gov. Code 1090 may be avoided at the instance of any party except the officer who is interested in the contract, and may not be avoided because of the interest of the officer unless the contract is made in the official capacity of the officer or the body or board of which he or she is a member. (1092.)

Existing law establishes statutes of limitations for the commencement of actions but does not specify which statute of limitations applies to claims under 1090 or 1092.

Existing law provides that other than for actions to recover real property, the time for commencement of actions

given to an individual or to an individual and the state is within one year upon a statute for a penalty or forfeiture unless another statute prescribes a different limitation, or within one year for an action upon a statute for a forfeiture or penalty given to the people of this state. (Code of Civil Procedure 340.)

Existing law provides that an action for relief not specifically identified in statute must be commenced within four years after the cause of action has accrued. (Code of Civil Procedure 343.)

Existing case law, Marin Healthcare Dist. v. Sutter Health (2002) 103 Cal.App.4th 861, held that claims brought pursuant to 1090 or 1092 are based on the public's right to be free of a government contract made under the influence of a financial conflict of interest and therefore the applicable statute of limitations is not one based on the remedy sought. Marin, thus, held that these claims are subject to the "catch-all" statute of limitations provided in the Code of Civil Procedure.

This bill would provide that claims brought under 1092 shall be commenced within four years after the plaintiff has discovered, or in the exercise of reasonable care should have discovered, a violation of 1090 in the making of a contract.

COMMENT

1. Need for the bill

According to the author, the absence of a statute of limitations applicable specifically to 1092 actions has resulted in ambiguities that disadvantage public entities trying to void contracts made by public officials in violation of conflicts of interest rules. The author argues that 1090 claims "often involve coordinated action between members of approving boards and private parties. They often hide their relationships to one another at the time of approval of the illegal contracts, and it is not until later wherein the public entities discover the illegal activities and seek justice under section 1090. Thus, a minimum of a four-year statute of limitations from the date of discovery by the public

entity of the illegality of the contract would protect a public entity's right to recovery under section 1090."

Apparently, defendants in the 1090 actions brought by the city of Southgate and by other public entities in similar situations have been asserting that the one-year statute of limitation for forfeitures apply to the public entities' claims. This bill would establish a four-year statute of limitations for 1092 actions that are based on violations of the conflict of interest prohibitions of 1090. It would therefore give public entities more time to gather information and develop their cases for voiding contracts that are grounded on violations of the public trust.

2. Marin Healthcare District v. Sutter Health and the Attorney General's Conflict of Interest Handbook

The Attorney General's Handbook on Conflict of Interest states that 1090 "basically prohibits the public official from being financially interested in a contract or sale in both his or her public and private capacities. In *Thomson v. Call* (1985) 38 Cal.3d 633, 649, the California Supreme Court reiterated the long-standing purpose and framework of Section 1090. The purpose of Section 1090 is to make certain that 'every public officer be guided solely by the public interest, rather than by personal interest, when dealing with contracts in an official capacity. Resulting in a substantial forfeiture, this remedy provides public officials with a strong incentive to avoid conflict-of-interest situations scrupulously.' (Id. at p. 650.)." The handbook further states that courts have held that a contract made in violation of 1090 is void; that any payments made to a third party must be returned and no future payments may be made; and that the public entity is entitled to retain any benefits it receives under the contract. (Citations omitted.)

The Attorney General's handbook also states that despite the language in 1092 that a contract "may be avoided," case law "has historically interpreted contracts made in violation of section 1090 to be void, not merely voidable." On this basis, the applicable statute of limitations would relate to the nature of the

remedy sought by a lawsuit to avoid the contract, which in most cases would be a forfeiture and thus a one-year statute of limitations would apply.

In Marin, supra, the Marin Healthcare District, a political subdivision of the state, brought suit to recover possession of a publicly owned hospital and related assets that it had leased and transferred in 1985 to defendant Marin General (owned by Sutter Health). The District claimed the 1985 agreements were void because its chief executive and legal counsel had a financial interest in the agreements at the time of their execution, in violation of 1090. The trial court held the suit was time-barred because it was filed 12 years later.

The appellate court in Marin was the first to squarely address the applicable statute of limitations for suits to void a contract in violation of Government Code 1090 or its predecessor statute. The court clearly stated that claims made under 1090 or 1092 are subject to applicable statutes of limitations. However, the appellate court's decision in Marin articulated a different basis for 1090 and 1092 claims than the nature of the remedy sought, which is what the various statutes of limitations in the Code of Civil Procedure is based upon. The court stated that claims brought pursuant to 1090 or 1092 are based on the public's right to be free of a government contract made under the influence of a financial conflict of interest and therefore the applicable statute of limitations is not one based solely on the remedy sought. While it appears the court agreed that the one-year statute of limitations for forfeitures could apply to the facts of that defendants), the court also said that even the four-year catch-all statute of limitations in C.C.P. 343 would bar the District's case because its claim was filed 12 years after it entered the contract in question.

More importantly, the Marin court held that applying C.C.P. 343 to the subject contracts "on the ground of illegality would certainly be consistent with existing case authority. (E.g., Moss v. Moss (1942) 29 Cal.2d 640, 644-645 [holding that cause of action for cancellation of

an agreement is governed by 343, in part because there is "no section of the code that expressly limits the time within which an action must be brought for cancellation of an instrument because of its illegality"]; Zakaessian v. Zakaessian (1945) 70 Cal.App.2d 721, 725 [161 P.2d 677] ["[o]rdinarily a suit to set aside and cancel a void instrument is governed by section 343 of the Code of Civil Procedure" unless, for example "the gravamen of the cause of action stated involves fraud or a mistake"]; (other citations omitted)." Thus, even though the Marin decision did not expressly hold that for all 1092 claims the applicable statute of limitations is four years under C.C.P. 343, it provides sufficient rationale for AB 1678 to articulate a four-year statute of limitations specifically for 1092 actions.

This bill would provide that a 1092 claim must be brought within four years of a plaintiff's discovery, or in the plaintiff's exercise of reasonable care should have discovered, of a conflict-of-interest violation under 1090. The relation back to the date of discovery of the violation for purposes of the statute of limitations is consistent with existing law.

Support: None Known

Opposition: None Known

HISTORY

Source: Author

Related Pending Legislation: None Known

Prior Legislation: None Known

Prior Vote: Asm. Cmte. on Local Gov. (Ayes 7, Noes 0)
Asm. Flr. (Ayes 75, Noes 0)

SUPREME COURT OF THE STATE OF CALIFORNIA

SUE C. BRANDENBURG,	}	Supreme Court Case No.
Plaintiff and		
Appellant	}	Court of Appeal Case No. A114366
V.		
EUREKA REDEVELOPMENT	}	Humboldt County Superior Court
AGENCY, et al.		Case No. CV050681
Defendants and	}	
Respondents		

PETITION FOR REVIEW

From an Opinion of the Court of Appeal,
First Appellate District, Affirming the
Judgment of the Superior Court for the
County of Humboldt

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NECESSITY FOR REVIEW

Review is necessary to settle an important question of law – the statute of limitations to be applied to actions brought under Government Code §§ 1090 *et seq.* to void contracts tainted by conflicts of interest. That statutory scheme prohibits public officials from being “financially interested in any contract made by them in their official capacity, or by any body or board of which they are members,”¹ provides that any contract made in violation of any of the provisions of the statutes “may be avoided,”² and imposes criminal liability for the willful violations of the statutory standards.³ Like other remedial statutes it has been interpreted broadly, and applied strictly.

The Court of Appeal erred in concluding that the action brought by Sue Brandenburg under Government Code §§ 1090 *et seq.* to void an executory contract violative of the referenced statutory scheme is barred by the provisions of Code of Civil Procedure § 340(a) that apply to an “action upon a statute for a penalty or forfeiture.” Its decision in that regard cannot be squared with the words of the relevant statutes, a century of case authority applying Code of Civil Procedure § 343 to actions to void agreements or other written instruments rendered unenforceable by illegality or other legal infirmity, the remedial policy underlying the statutory and common law proscriptions against the enforcement of such contracts, or the

¹ Government Code § 1090.

² Government Code § 1092.

³ Government Code § 1097.

standard rules of statutory construction designed to determine legislative intent. Review of the Court of Appeal's decision is necessary both to establish this important point of law and to avoid an injustice in this case, and in others.

In reaching its conclusion that an action based on Government Code §§ 1090 and 1092 is "an action on a statute for a penalty or forfeiture" within the terminology of Code of Civil Procedure § 340(a), the Court of Appeal disregarded the actual words of the relevant statutes; neither Government Code § 1090 nor Government Code § 1092 provides for a "forfeiture" within the meaning of Code of Civil Procedure § 340(a). Rather, they simply prohibit public officials from having a financial interest in contracts made by the bodies they serve and provide that such contracts are void. The legal effect of voiding the unlawful contract is that the interested official cannot enforce that contract, and may in certain circumstances be required to return whatever he has received without recovering that with which he parted, but the statutes by their terms do not suggest, much less mandate, such a result.

The common law *remedy* for a violation of these statutes may, as this Court noted in *Thomson v. Call* (1985) 38 Cal.3d 633, 646-47, include a forfeiture, but that is the consequence not of the statute that voids the contract but of common law doctrine as to the effect of such voiding. As this Court also noted in *Thomson v. Call* (1985) 38 Cal.3d 633, 646-47, neither Government Code § 1090 nor Government Code § 1092 prescribes a remedy, and courts have had to fashion one. By contrast, cases applying Code of Civil Procedure § 340(a) appropriately have done so in cases where the relevant statute

expressly directs a forfeiture. Under no proper method of analysis can either Government Code § 1090 or Government Code § 1092 be considered “a statute for a penalty or forfeiture.”

For more than a century California courts have held that “ordinarily a suit to set aside and cancel a void instrument is governed by section 343 of the Code of Civil Procedure.” *See, e.g., Zakaessian v. Zakaessian*, 70 Cal.App.2d 721, 725 (1945). Regardless of the reason for cancelling a void contract or instrument – public policy, common law, or statute – Code of Civil Procedure § 343 has been the applicable statute of limitations. The Court of Appeals erred in departing from this century of uniform authority, and its error affects not only Brandenburg’s effort to enforce principles of clean government but the efforts of all others whose actions were filed within the time limitations of Code of Civil Procedure § 343 but not within those of Code of Civil Procedure § 340(a).

This Court on more than one occasion has said that statutes such as Government Code §§ 1090 and 1092 must be interpreted broadly to effect the social benefits for which they were enacted. As a matter of policy, it makes little sense to recognize the remedial nature of the statutes and thereby give them broad application while at the same time ignoring their salutary purpose and limiting severely the time in which they might be applied. Forcing actions challenging violations of Government Code §§ 1090 and 1092 into the limited time frame for commencement provided by Code of Civil Procedure § 340(a) cuts against the broad interpretation of legislative intent applied to the coverage of the statutes, resulting in their having broad substantive sweep but limited temporal utility.

Such a narrow temporal interpretation likewise contradicts what the Legislature no doubt intended in its enactment of Government Code §§ 1090 and 1092 and their predecessors. It was and remains a rule of common law that contracts tainted by conflicts of interest are void. *See, e.g., President and Trustees of the City of San Diego v. San Diego and Los Angeles Railroad Company* (1872) 44 Cal. 106, 112 and the language it adopts from *Aberdeen Railway Company v. Blakie*, 1 McQueen's R. 461. In the absence of Government Code §§ 1090 and 1092, this action to declare the relevant contract void and to enjoin its performance would have been based on the common law, and Code of Civil Procedure § 343 would have governed the timeliness of its filing. It is hard to accept that by affirmatively adopting Government Code §§ 1090 and 1092 the Legislature intended to reduce by seventy-five percent the amount of time available to challenge the efficacy of interested contracts.

The decision of the Court of Appeals is wrong as a matter of law, and as a matter of policy. If allowed to stand it will make enforcement of the public's interest in rules intended to ensure honest government more difficult to vindicate, and will make it easier for those who contravene those rules to escape the consequences of their conduct. This Court should review the decision of the Court of Appeal, reverse it, and make it clear that claims brought under Government Code §§ 1090 and 1092 are governed by the four-year statute of limitations contained in Code of Civil Procedure § 343.

STATEMENT OF FACTS

Because the trial court dismissed the action in response to a demurrer, it and the Court of Appeal properly accepted the facts as pled in the First Amended Complaint against which the demurrer was interposed. Those facts will be summarized briefly here.

Defendant and Respondent Eureka Redevelopment Agency (“Agency”) is a legal entity created by the City of Eureka (“Eureka”), a charter city located in Humboldt County, California. Defendant and Respondent Delores Vellutini (“Vellutini”) is a resident of Eureka and is a partner in Defendant and Respondent Eureka Waterfront Partners (“Partners”), a partnership located in the Eureka.

In accordance with its Charter, is governed by its City Council (“Council”). Pursuant to the provisions of Health & Safety Code § 33200, the Council appointed itself as the Agency. On or about August 23, 1993, the Agency by resolution created the Redevelopment Advisory Board (“RAB”). The RAB was created to, among other things, “review private development proposals which are requesting redevelopment funds and make recommendations to the Agency Board regarding whether the project meets program guidelines and is appropriate for Agency assistance,” and to “review special requests for Redevelopment funding from outside organizations and make recommendations to the Agency Board of Directors regarding whether the request meets the intent of redevelopment.”

On or about July 19, 1994, Vellutini was appointed to the

RAB, and served continuously until 2005. Although the Agency resolution creating the RAB provided that the RAB “will review agreements with the final agreement being approved by the Agency Board of Directors,” in reality redevelopment decisions effectively were made by the RAB on virtually all matters referred to it. During the years 1994 through the making of the contract at issue here on December 21, 2001, the RAB made approximately fifty recommendations to the Agency, and the Agency adopted every one of those recommendations.

Government Code § 1090 provides, in relevant part, that “members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members.” Government Code § 1092 provides, in relevant part, that “[e]very contract made in violation of any of the provisions of Section 1090 may be avoided at the instance of any party except the officer interested therein.” Appellate authority in the State of California makes it clear that every contract made in violation of the referenced statute is not merely voidable, but absolutely void.

Health & Safety Code § 33130 provides, in relevant part, that “[n]o agency or community officer or employee who in the course of his or her duties is required to participate in the formulation of, or to approve plans or policies for, the redevelopment of a project area shall acquire any interest in any property included within a project area within the community.” The purpose of Health & Safety Code § 33130 is precisely the same as the purpose of Government

Code § 1090 – to prohibit conflicts of interest on the part of those entrusted with making decisions for governmental agencies and other entities.

Vellutini and Partners responded to a request for proposal for the development of property known as the Fishermen's Building by submitting a proposal. That proposal and competing proposals were considered by the RAB, which then voted to recommend to the Agency that it enter into a 180 day Exclusive Right to Negotiate Agreement (granting Vellutini and Partners the exclusive right to negotiate with the Agency to acquire and develop the Fishermen's Building property). The Agency, as it did with every recommendation made during the years 1994 through 2002, adopted or "rubber-stamped" the RAB's recommendation. Eventually, a Disposition and Development Agreement was signed on December 21, 2001. The Disposition and Development Agreement granted Vellutini and Partners the right to acquire the Fishermen's Building property from the Agency and develop it, and set the terms for that acquisition and development.

Plaintiff and appellant Sue Brandenburg ("Brandenburg") initiated this action on September 12, 2005, seeking injunctive and declaratory relief. She alleged that although the Disposition and Development Agreement was technically entered into by the Agency, and not by the RAB of which Vellutini was a member, under California conflict of interest laws – which use a practical, rather than technical, test to achieve their purpose – and under the facts alleged the RAB may be treated as the contracting party for the purposes of conflict of interest laws.

Vellutini admittedly has a financial interest in the Disposition and Development Agreement that is not “remote” within the meaning of Government Code §1091. Brandenburg alleged that because Vellutini, then a member of the RAB, had and has a prohibited interest in a contract effectively made by the RAB, that agreement – the Disposition and Development Agreement – is void and its performance should be enjoined.

Moreover, by virtue of the Disposition and Development Agreement, Vellutini and Partners acquired in December of 2001 – while Vellutini was a member of the RAB – a contractual right to acquire an interest in a “property included within a project area within the community.” Under the provisions of Health & Safety Code § 33130, the contractual right to acquire an interest in a property within a project area is, and the actual acquisition of the property would be, unlawful and a violation of that statute. For that reason as well, Brandenburg asserted that the Disposition and Development Agreement is void and its performance should be enjoined.

PROCEDURAL HISTORY

Agency demurred to the First Amended Complaint primarily on the ground that the action was barred by the provisions of Code of Civil Procedure § 338 because it was brought more than three years after the execution of the Disposition and Development Agreement. Vellutini and Partners joined in that demurrer. Brandenburg urged that the applicable statute of limitations is that set forth in Code of Civil Procedure § 343. The trial court agreed with

Agency, sustained the demurrer without leave to amend on the basis of Code of Civil Procedure § 338, and entered a judgment of dismissal. The appeal followed.

The Court of Appeal discussed both Code of Civil Procedure § 338 and Code of Civil Procedure § 343, but decided that neither applies here. Rather, it concluded that because the statutory scheme mandates the voiding of any contract violative of its terms, the interested official “forfeits” any rights derived from the contract. Thus, the Court of Appeal decided that any action seeking the voiding of an illegal contract is an “action upon a statute for a penalty or forfeiture” within the meaning of Code of Civil Procedure § 340(a) and is barred if not brought within one year. No rehearing was sought.

LEGAL ARGUMENT

A. Neither Government Code §1090 nor Government Code §1090 Constitutes a “Statute for a Forfeiture”

The decision of the Court of Appeal below to apply the provisions of Code of Civil Procedure § 340(a) to an action founded on Government Code §§ 1090 and 1092 disregards the well-recognized definition of “penalty or forfeiture” used by the courts of this State to determine whether Code of Civil Procedure § 340(a) applies to a given claim. The Court of Appeal properly recognized that “[n]either Government Code section 1090 nor Government Code section 1092 imposes a *penalty* as that term is interpreted under

section 340.”⁴ It then went on to hold, however, that Code of Civil Procedure § 340(a) “‘also applies to [a]n action upon a . . . forfeiture,’ that a “forfeiture is ‘[t]he divestiture of property without compensation’ or [t]he loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty,” and that the cited statutes “do impose a forfeiture consisting of the loss of any contract rights or interests as the result of the breach of the obligation or duty of the interested public official not to have a proscribed interest in contracts made in their official capacity or by a body or board of which they are a member.”

In reaching its conclusion, the Court of Appeal disregarded the actual words of the relevant statutes; neither Government Code § 1090 nor Government Code § 1092 provides for a forfeiture. Rather, the former prohibits contracts infected with a specific form of illegality and the latter directs that such contracts are void. The net effect set by common law principles of voiding the unlawful contract is that the guilty official cannot enforce that

⁴ “The term ‘penalty’ has a very comprehensive meaning. While often used as synonymous with the word ‘punishment,’ or as including a sum payable upon the breach of a private contract, it has also the more restricted meaning of a sum of money made payable by way of punishment for the nonperformance of an act or for the performance of an unlawful act, and which, in the former case, stands in lieu of the act to be performed . . . ‘Forfeiture’ imports ‘a penalty’ (*Muldoon v. Lynch*, 66 Cal. 536, 539 [6 P. 417]), a ‘requirement to pay the sum mentioned as a mulct for a default or wrong. (*People v. Reis*, 76 Cal. 269, 277 [18 P. 309]; see *Agudo v. County of Monterey*, 13 Cal.2d 285, 289 [89 P.2d 400].)” *County of San Diego v. Milotz* (1956) 46 Cal.2d 761, 766.

contract, and in certain circumstances may be required to return whatever he received without the ability to recover that with which he parted. The common law *remedy* for a violation of these statutes may in certain circumstances include what could be considered a forfeiture, but that is the consequence not of the statutes but of common law doctrine. *Thomson v. Call* (1985) 38 Cal.3d 633, 646-47. By no proper method of analysis can either of these statutes be considered “a statute for a penalty or forfeiture.”

Historically, courts of this State have applied the statute of limitations set forth in Code of Civil Procedure § 340(a) to cases brought under statutes *that by their terms* direct or require *a forfeiture*. For example, Civil Code § 2941(d) provides that “[t]he violation of this section shall make the violator liable to the person affected by the violation for all damages . . . and shall require that the violator forfeit to that person the sum of five hundred dollars (\$500),” and § 340(a) was applied to an action seeking to enforce such a forfeiture.

Prudential Home Mortgage Co. v. Superior Court (1998) 66 Cal.App.4th 1236. Similarly, “[s]ection 11610 of the Health & Safety Code provides that ‘[a] vehicle used to unlawfully transport or facilitate the unlawful transportation of any narcotic . . . shall be forfeited to the State,’” and § 340(a) was applied to an action seeking to enforce such a forfeiture. *People v. One 1951 Chevrolet 2-Door* (1958) 157 Cal.App.2d 301, 303-304. And Penal Code § 325 provides that “[a]ll moneys and property offered for sale or distribution in violation of any of the provisions of this chapter [chap. IX, tit. IX, pt. I] are forfeited to the state. . .” and § 340(a) was applied to an action seeking to enforce such a forfeiture. *People v. Grant*

(1942) 52 Cal.App.2d 794, 799.

The Court of Appeal mentioned none of these cases, or any other addressing a statutory forfeiture. Rather, it relied for its conclusion on two cases: *Marin Healthcare Dist. v. Sutter Health* (2002) 103 Cal.App.4th 861 and *Low v. Lan* (2002) 96 Cal.App.4th 1371, 1381-1382. The former did not decide which statute of limitations applies to a claim brought under Government Code §§ 1090 and 1092, but suggested that the applicable statute of limitations is Code of Civil Procedure § 343. The latter did not involve Government Code § 1090 or § 1092 at all, but its discussion of why a recoverable preference does not constitute a “forfeiture” offers no support for the conclusion at issue here.

“‘[F]orfeiture is a penal concept.’ [Citations omitted]. The word is typically used in a ‘criminal context.’ [Citations omitted]. Currently the most common examples of ‘forfeitures’ involve property used in illegal drug dealing. Such forfeitures are very ‘penal’ indeed.” *Id.* at 1381. “By the same token, our Supreme Court has held that statutory recoveries that were ‘not penal but remedial in nature’ were not within the purview of the one-year statute for penalties and forfeitures. (See *Willcox v. Edwards* (1912) 162 Cal. 455, 463-464 [123 P. 276].)” *Id.*

While violations of Government Code §§ 1090 and 1092 can have a criminal element – which where present is addressed in Government Code § 1097 – the scheme is “not penal but remedial in nature.” The statutes are intended not to punish wrongdoing, but to prevent it.

“The statute is thus directed not only at dishonor, but also at conduct that tempts dishonor. This broad proscription embodies a recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government. To this extent, therefore, the statute is more concerned with what might have happened in a given situation than with what actually happened. It attempts to prevent honest government agents from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation.”

Thomson v. Call (1985) 38 Cal.3d 633, 648-649, quoting *Stigall v. City of Taft* (1962) 58 Cal.2d 565, 570, in turn quoting *United States v. Mississippi Valley Generating Co.* (1961) 364 U.S. 520.

The statutes do no more than prescribe that a public officer cannot enter into certain contracts – fair or unfair, honest or dishonest, beneficial to the public or detrimental to the public – and if he does so the contract is voidable. Their purpose is to prevent both impropriety and the possibility or appearance of impropriety by setting a standard of conduct to which such officials must adhere, and they achieve that purpose by refusing to recognize any rights flowing to the official from contracts that do not meet those standards. They require no inherent dishonesty, nor do they by their terms direct the forfeiture of anything. Claims brought thereunder simply are not within the contemplation of Code of Civil Procedure § 340(a).

Despite the plain meaning of Code of Civil Procedure § 340(a), the Court of Appeal went so far as to hold that “[e]ven where the contract is executory, an injunction based upon Government Code sections 1090 and 1092 deprives the parties of the right to enforcement of the contract, and of receiving the benefit of their bargain” and therefore constitutes a forfeiture. Under that rationale, any claim seeking to enjoin or declare void any contract rendered voidable by any statute would be subject to the limitations of Code of Civil Procedure § 340(a); after all, if the action were to succeed, the defendant would be deprived “of the right to enforcement of the contract, and of receiving the benefit of [his or her] bargain.” But no case so holds, and the Court of Appeal’s reasoning is flawed.

B. Actions to Void Illegal Agreements or Instruments are Governed by Code of Civil Procedure § 343.

The Court of Appeal in its analysis turned to its earlier decision in *Marin Healthcare Dist. v. Sutter Health* (2002) 103 Cal.App.4th 861, quoting from it several times. In that case, the Marin Healthcare District brought an action in 2000 to void two related agreements – a 30-year lease of a hospital facility and the transfer of tangible assets to the lessee – into which it had entered in 1985 because two District officials were at the time also directly interested in the lessee. Thus, the District argued, the agreements violated Government Code § 1090 and should be declared void, and the leased premises and the transferred assets should be restored to the District. The Court there was required to consider whether a statute of limitations applied, and if so which one.

The Court first noted that to “determine the applicable statute of limitations, we must look to the “nature of the right sued upon and not ... the relief demanded.” (*Hensler v. City of Glendale*, supra, 8 Cal.4th at p. 23.).” *Id.* at 877. There, the District sought a determination that two contracts were void pursuant to Government Code § 1090 and the consequent return of the leasehold interest and the re-transfer of assets originally transferred to the lessee. Because, under *Thomson v. Call*, 38 Cal.3d 633, 646-47 (1985), a governmental agency “is entitled to recover any consideration which it has paid, without restoring the benefits received under the contract,” the Court observed that “the one-year limitations period under section 340, subdivision (1), could be argued to apply to the District’s claims to declare the 1985 contracts void and to repossess the transferred assets because it applies to ‘[a]n action upon a statute for a penalty or forfeiture . . .’” *Marin Healthcare Dist. v. Sutter Health*, 103 Cal.App.4th at 877.

But the Court did not so hold. Rather, it quoted the language of Code of Civil Procedure § 343 – “An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued” – and observed that “[a]pplying section 343 to this action to void the 1985 contracts on the ground of illegality would certainly be consistent with existing case authority.” *Id.* at 878.⁵

The Court in *Marin Healthcare Dist. v. Sutter Health* was

⁵ Ultimately it did not decide which statute applied, as the time set by both Code of Civil Procedure §§ 340(a) and 343 had long expired.

absolutely correct in its analysis; application of the four year statute of limitations contained in Code of Civil Procedure § 343 is “consistent with existing authority” addressing claims seeking the voiding or cancellation of contracts or other instruments based on their illegality or other legal infirmity. Numerous courts have said that “ordinarily a suit to set aside and cancel a void instrument is governed by section 343 of the Code of Civil Procedure.” *See, e.g., City of Petaluma v. Hickey* (1928) 90 Cal.App. 616 (an action to recover money illegally paid by a city official brought on the theory that the defendant was an involuntary trustee); *Zakaessian v. Zakaessian* (1945) 70 Cal.App.2d 721, 725 (action to set aside deed on the ground of mistake); *Wade v. Busby* (1944) 66 Cal.App.2d 700, 702 (action to set aside deed on the ground of undue influence); *Trubody v. Trubody* (1902) 137 Cal. 172, 174 (same); *Boyd v. Lancaster* (1942) 56 Cal.App.2d 103, 111 (action to set aside deed on ground of incompetence); *Estate of Pieper* (1964) 224 Cal.App.2d 670, 688-689 (action to set aside deed for non-delivery); *See, also, Robertson v. Superior Court* (2001) 90 Cal.App.4th 1319, 1326-1327.

In *Moss v. Moss* (1942) 20 Cal.2d 640, 642, this Court applied that statute to a claim seeking to void a contract because of its illegality. The action here, brought to void or prevent enforcement of a contract made unenforceable by its illegality, is conceptually no different, and the Court of Appeal erred in concluding that Code of Civil Procedure § 343 does not apply here. This Court should correct that error, and bring this case back in line with a century of authority.

C. The Court of Appeal's Decision Disregarded the Policy of Broad Interpretation of Remedial Statutes

This Court on more than one occasion has recognized that the Legislature in its enactment of Government Code §§ 1090 and 1092 intended a broad interpretation to effect the social benefits for which they were enacted. *See, e.g. Thomson v. Call*, 38 Cal.3d 633, 644-45; *Stigall v. City of Taft* (1962) 58 Cal.2d 565, 571. And it has directed that courts of this State take a practical, rather than technical, approach in considering whether there is a prohibited interest on the part of a public official, direct or indirect, and whether the agreement was “made” while the official was a member of the contracting body. In the latter case, the fact that the official was a member of the body during discussions of the contract but resigned before its technical execution was insufficient to remove the contract from the ambit of the referenced sections and their prohibitions.

Forcing actions challenging violations of Government Code §§ 1090 and 1092 into the limited time frame for commencement provided by Code of Civil Procedure § 340(a) cuts against the broad interpretation of legislative intent applied to the coverage of the statutes, resulting in their having broad substantive sweep but limited temporal utility. As a matter of policy, such an interpretation cannot be justified. The “policy goals of Section 1090” recognized by this Court in *Thomson v. Call*, 38 Cal.3d 633, 644-45 are not served by straining to limit the statutes’ utility.

D. The Court of Appeal's Opinion Misconstrues Legislative Intent

Such a narrow temporal interpretation likewise contradicts what the Legislature undoubtedly intended in its enactment at different times of differing statutes of limitation and of Government Code §§ 1090 and 1092 and their predecessors. Although the Legislature's intended interplay between those statutes of limitations and Government Code §§ 1090 and 1092 does not appear to have been the subject of express legislative discussion or pronouncement, it strains credulity to suggest that by enacting Government Code §§ 1090 and 1092 the legislature intended to reduce, rather than expand, the public's protection from contracts tainted by conflicts of interest on the part of governmental officials. Yet that is precisely what the decision of the Court of Appeals suggests.

The determination of legislative intent always starts with the words the legislature chose to use. Where, as here, that intent is not obvious by the words alone, courts must use such "extrinsic aids" as "the purpose of the statute, the evils to be remedied, . . . public policy, and the statutory scheme encompassing the statute." *Torres v. Parkhouse Tire Serv.* (2001) 26 Cal.4th 995, 1003, citing *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 977. Here, the purpose of Government Code §§ 1090 and 1092 was remedial, and to further amplify the strict rules against interested contracts. It clearly was not the Legislature's intent to reduce the public's protection from such contracts by a drastic reduction in the time permitted to challenge them from the four years allowed by Code of Civil Procedure § 343 to

the single year allowed by Code of Civil Procedure § 340(a). The evil to be remedied is having public officials torn between self interest and the public's interest, and the Legislature did not likely intend to shorten the time in which that evil could be exposed and remedied. Criminal charges under Government Code § 1097 must be brought within three years from discovery – *People v. Honig* (1996) 48 Cal.App.4th 289, 304 – and it is hard to argue that the Legislature intended to require remedial civil actions for less serious violations to be brought in a fraction of that time.

It was and remains a rule of common law that contracts tainted by conflicts of interest are void. *See, e.g., President and Trustees of the City of San Diego v. San Diego and Los Angeles Railroad Company* (1872) 44 Cal. 106, 112 and the language it adopts from *Aberdeen Railway Company v. Blakie*, 1 McQueen's R. 461. In the absence of Government Code §§ 1090 and 1092, this action to declare the relevant contract void and to enjoin its performance would have been based on the common law, and Code of Civil Procedure § 343 unquestionably would have governed the timeliness of its filing. It is hard to accept that by affirmatively adopting Government Code §§ 1090 and 1092 the Legislature intended to reduce by seventy-five percent the amount of time available to challenge the efficacy of interested contracts. There simply is no basis to conclude that the Legislature intended actions brought to enforce Government Code §§ 1090 and 1092 to be limited by Code of Civil Procedure § 340(a), and the Court of Appeal's implied conclusion to the contrary should not be permitted to stand.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Court of Appeal erred by applying to the claims raised in the First Amended Complaint in this action the limitation established by Code of Civil Procedure § 340 rather than that established by Code of Civil Procedure § 343. That error is of substantial magnitude and if not corrected will undermine the efforts of Brandenburg, and others, to enforce legal standards at the core of sound and honest government. Accordingly, this Court should grant review of the decision of the Court of Appeal, reverse it, and make clear that the applicable statute of limitations is Code of Civil Procedure § 343.

Dated: August 7, 2007

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CERTIFICATE OF WORD COUNT

I, Neil L. Shapiro, certify that according to the word count feature of Microsoft Word 2003, the foregoing Appellant's Opening Brief, excluding the tables of contents and authorities, contains fewer than 5,500 words

Executed at Monterey, CA, this 7th day of August, 2007.

I declare under penalty of perjury that the foregoing is true and correct.

Neil L. Shapiro